Applicant Details

First Name	**Ashton**
Middle Initial	**P**
Last Name	**Jones-Doherty**
Citizenship Status	**U. S. Citizen**
Email Address	**apj12@georgetown.edu**
Address	**Address** Street **450 K St NW** City **Washington** State/Territory **District of Columbia** Zip **20001** Country **United States**
Contact Phone Number	**678-764-1325**

Applicant Education

BA/BS From	**University of Georgia**
Date of BA/BS	**May 2019**
JD/LLB From	**Georgetown University Law Center** **https://www.nalplawschools.org/employer_profile?FormID=961**
Date of JD/LLB	**May 17, 2022**
Class Rank	**School does not rank**
Does the law school have a Law Review/Journal?	**Yes**
Law Review/Journal	**No**
Moot Court Experience	**No**

Bar Admission

Admission(s)	**District of Columbia**

Prior Judicial Experience

Judicial Internships/ Externships	**Yes**
Post-graduate Judicial Law Clerk	**No**

Specialized Work Experience

Specialized Work Experience	**Appellate**

Professional Organization

Organizations	**Washington, D.C. Bar; Washington, D.C. LGBTQ+ Bar Association**

Recommenders

Warden, Nick
nwarden@baileyglasser.com
208.342.4411
Sorensen, Stephen
ssorensen@baileyglasser.com
202.463.2101
Langevoort, Donald
langevdc@law.georgetown.edu

References

Stephen Sorensen, Partner at Bailey & Glasser
E-Mail: ssorensen@baileyglasser.com
Phone: 202-463-2101

Joel Nolette, Associate at Wiley and former clerk to Judge Timothy J. Kelly of the District Court for the District of Columbia
E-Mail: jnolette@wiley.law
Phone: 202-719-4741

Nick Warden, Partner at Bailey & Glasser
E-Mail: nwarden@baileyglasser.com
Phone: 208-342-4411

Donald Langevoort, Thomas Aquinas Reynolds Professor of Law at Georgetown University Law Center

E-Mail: langevdc@law.georgetown.edu
Phone: 202-662-9832

Randy Barnett, Patrick Hotung Professor of Constitutional Law at Georgetown University Law Center
E-Mail: rb325@law.georgetown.edu
Phone: 202-662-9936

This applicant has certified that all data entered in this profile and any application documents are true and correct.

Ashton Peter Jones-Doherty

450 K Street N.W., Washington, D.C. 20001/ apj12@georgetown.edu / (678) 764-1325

August 2, 2023

The Honorable James O. Browning
U.S. District Court for the District of New Mexico
Pete V. Domenici U.S. Courthouse
333 Lomas Boulevard, N.W.
Room 660
Albuquerque, N.M. 87102

Dear Judge Browning:

I am excited about the opportunity to be one of your clerks for the 2025–2026 term. I am interested in any additional terms as well. With my diverse professional experiences, I believe I am perfectly suited for a clerkship.

I am a graduate of both Georgetown University Law Center and the University of Georgia. While at the University of Georgia, I studied abroad at the University of Oxford, Keble College. Currently, I am a commercial litigation associate at Bailey & Glasser.

A clerk's role in advising and helping craft judicial decisions on a variety of legal issues greatly interests me. And my professional experiences have prepared me to smoothly transition into this role. For instance, I have an extensive background in complex litigation. Even before graduating from Georgetown, at International Rights Advocates, a non-profit seeking to end international child slavery, I researched the history of the Alien Tort Statute and incorporated that research into the non-profit's Supreme Court of the United States briefs in *Nestlé v. Doe*. Likewise, at Bailey & Glasser, I have researched federal Commerce Clause interpretations to advise on and draft briefs to the Sixth Circuit in *Foresight Coal Sales, LLC v. Chandler*, a Dormant Commerce Clause case invalidating certain taxes imposed on out-of-state corporations. In sum, at each employer, I advised the overseeing attorneys with precise and exhaustive research. As one of your clerks, I will approach my tasks with equal comprehensiveness.

My professional experience includes advising both Executive and Judicial Branch officials as well. Here are two examples. First, at the Department of Justice's Office of Legal Policy (OLP), I advised OLP attorneys on regulatory decisions on firearms, as well as vetted and prepped federal district and circuit judicial nominees. Often, I drafted letters to the Attorney General and the White House Counsel's Office on such topics in conjunction with OLP attorneys and the Office of Legislative Affairs. Moreover, as a judicial intern to Judge Timothy J. Kelly of the District Court for the District of Columbia, I drafted bench memoranda and orders on interbranch disputes involving constitutional actors by prioritizing absolute clarity over impressive abstraction when explaining complex legal doctrines. My attached writing sample—an excerpt of my upcoming *Arizona State Law Journal* publication, "Morally Regulatable Lives"—exemplifies this approach. At bottom, these experiences have well prepared me to help advise and draft any legal document on any legal issue. And I believe a clerkship in your chambers will only further hone these skills.

Thank you for your time and consideration, and I look forward to hearing from you. I can be reached at the contact information above.

Warmest Regards,
Ashton P. Jones-Doherty

Ashton Peter Jones-Doherty

450 K Street N.W., Washington, D.C. 20001/ apj12@georgetown.edu / (678) 764-1325

Education

Georgetown University Law Center **May 2022**
Juris Doctor Washington, D.C.
GPA: 3.58
Honors and Awards: *Pro Bono* Honoree (100-Hours); Dean's List fall 2020
Journal: *Georgetown Law Journal's Annual Review of Criminal Procedure*, Editorial Contributor
Clinic: Georgetown's Environmental Law and Justice Clinic, *Student Attorney*, spring 2021

University of Georgia **May 2019**
Bachelor of Arts, *magna cum laude,* Political Science Athens, GA
GPA: 3.81
Honors and Awards: *Phi Beta Kappa*; *Omicron Delta Kappa*; University of Georgia's Oxford Scholarship
Journal: *Georgia Political Review*, Managing Editor
Study Abroad: University of Oxford, Keble College **spring 2018**
Oxford, England

Experience

Bailey & Glasser **August 2022 – Present**
Associate Washington, D.C.
- Drafted and finalized appellate briefs in federal Commerce Clause, administrative, and environmental law cases
- Prepared memoranda for accounting fraud cases on each case's ability to impact current securities regulations
- Examined case witnesses in Title IV cases involving both private and state universities
- Strategized with firm partners on legislative strategies to accomplish litigation goals

U.S. District Court for D.C., Chambers of Judge Timothy J. Kelly **January 2022 – May 2022**
Judicial Intern Washington, D.C.
- Composed court orders on *Chevron* deference, FOIA reviews, and varied criminal cases
- Revised and provided legal recommendations to Judge Kelly and his clerks regarding interbranch disputes
- Created sentencing tracking spreadsheets for Judge Kelly to promote case consistency

Department of Justice, Office of Legal Policy (OLP) **August 2021 – December 2021**
Law Clerk Washington, D.C.
- Vetted and coached federal appellate and district court nominees for confirmation hearings
- Authored OLP memoranda for Congressional committees, agencies, and the White House Counsel's Office
- Strategized and drafted Department statements on firearm regulations with the Office of Legislative Affairs

International Rights Advocates **May 2020 – August 2020**
Law Clerk Washington, D.C.
- Drafted sections of Respondents' briefs in *Nestlé v. Doe*, a United States Supreme Court case
- Coordinated and participated in international fact-finding tours for human rights cases

Department of Justice, Environment and Natural Resources Division **January 2019 – May 2019**
Law Clerk Washington, D.C.
- Synthesized and prepared memoranda on regulatory PFAS advances for prospective litigation
- Prepared and finalized briefs on Clean Water Act and Clean Air Act compliance

Publications

Forthcoming Publication

Morally Regulatable Lives: Corporate Sovereignty, the Rise of Burwell v. Hobby Lobby, and the Ironic Demise of The Walt Disney Company's Reedy Creek Improvement District, __ ARIZ. ST. L.J.__ (2023)

Advisor On

Torrell E. Mills, *'Hit the Road, Blue Slips': Eliminating Senate Obstructionism of Federal Judaical Appointments*, 111 GEO L.J. ONLINE 171 (2023).

Admissions and Associations

Washington, D.C. Bar [#90005135]; Washington, D.C. LGBTQ+ Bar Association

Record of: Ashton P. Jones-Doherty
GUID: 832680904

Course Level: Juris Doctor

Degrees Awarded:
Juris Doctor Jun 08, 2022
Georgetown University Law Center
Major: Law

Entering Program:
Georgetown University Law Center
Juris Doctor
Major: Law

Subj	Crs	Sec	Title	Crd	Grd	Pts	R
Fall 2019							
LAWJ	001	94	Civil Procedure Kevin Arlyck	4.00	B	12.00	
LAWJ	002	43	Contracts Donald Langevoort	4.00	B	12.00	
LAWJ	004	94	Constitutional Law I: The Federal System Laura Donohue	3.00	B	9.00	
LAWJ	005	40	Legal Practice: Writing and Analysis Jonah Perlin	2.00	IP	0.00	

	EHrs	QHrs	QPts	GPA
Current	11.00	11.00	33.00	3.00
Cumulative	11.00	11.00	33.00	3.00

Subj	Crs	Sec	Title	Crd	Grd	Pts	R
Spring 2020							
LAWJ	003	41	Criminal Justice Christy Lopez	4.00	P	0.00	
LAWJ	005	40	Legal Practice: Writing and Analysis Jonah Perlin	4.00	P	0.00	
LAWJ	007	94	Property Sheila Foster	4.00	P	0.00	
LAWJ	008	94	Torts Gary Peller	4.00	P	0.00	
LAWJ	1603	50	How to Regulate David Hyman	3.00	P	0.00	

Mandatory P/F for Spring 2020 due to COVID19

	EHrs	QHrs	QPts	GPA
Current	19.00	0.00	0.00	0.00
Annual	28.00	11.00	33.00	3.00
Cumulative	30.00	11.00	33.00	3.00

Subj	Crs	Sec	Title	Crd	Grd	Pts	R
Fall 2020							
LAWJ	1067	05	English Legal History Sem James Oldham	3.00	A	12.00	
LAWJ	121	09	Corporations Donald Langevoort	4.00	A-	14.68	
LAWJ	1663	05	The Federal Courts and the World Seminar: History, Developments, and Problems Kevin Arlyck	2.00	A-	7.34	
LAWJ	235	07	International Law I: Introduction to International Law H. Thomas Byron	3.00	P	0.00	
LAWJ	430	05	Recent Books on the Constitution Seminar Randy Barnett	2.00	A	8.00	

Dean's List Fall 2020

----------Continued on Next Column----------

	EHrs	QHrs	QPts	GPA
Current	14.00	11.00	42.02	3.82
Cumulative	44.00	22.00	75.02	3.41

Subj	Crs	Sec	Title	Crd	Grd	Pts	R
Spring 2021							
LAWJ	1288	08	Politics of Litigation and Litigation of Politics Robert Weiner	2.00	A	8.00	
LAWJ	528	06	Environmental Law and Justice Clinic (IPR) Hope Babcock		NG		
LAWJ	528	87	~Written & Oral Communication Hope Babcock	4.00	B+	13.32	
LAWJ	528	88	~Research & Analysis Hope Babcock	4.00	B+	13.32	
LAWJ	528	89	~Professionalism & Advocacy Hope Babcock	4.00	A	16.00	

	EHrs	QHrs	QPts	GPA
Current	14.00	14.00	50.64	3.62
Annual	28.00	25.00	92.66	3.71
Cumulative	58.00	36.00	125.66	3.49

Subj	Crs	Sec	Title	Crd	Grd	Pts	R
Fall 2021							
LAWJ	1491	01	Externship I Seminar (J.D. Externship Program) Sandeep Prasanna		NG		
LAWJ	1491	119	~Seminar Sandeep Prasanna	1.00	A	4.00	
LAWJ	1491	121	~Fieldwork 3cr Sandeep Prasanna	3.00	P	0.00	
LAWJ	215	09	Constitutional Law II: Individual Rights and Liberties Randy Barnett	4.00	B+	13.32	
LAWJ	309	07	Congressional Investigations Seminar Robert Muse	2.00	A	8.00	
LAWJ	361	09	Professional Responsibility Philip Sechler	2.00	A-	7.34	
LAWJ	524	08	Supervised Research Donald Langevoort	1.00	IP	0.00	

	EHrs	QHrs	QPts	GPA
Current	12.00	9.00	32.66	3.63
Cumulative	70.00	45.00	158.32	3.52

----------Continued on Next Page----------

This is not an official transcript. Courses which are in progress may also be included on this transcript.

Record of: Ashton P. Jones-Doherty
GUID: 832680904

Subj	Crs	Sec	Title	Crd	Grd	Pts	R
Spring 2022							
LAWJ	1286	08	Human Trafficking and Modern Slavery in the 21st Century: Legal Perspectives	2.00	A	8.00	
	David Abramowitz						
LAWJ	1492	17	Externship II Seminar (J.D. Externship Program)		NG		
	Joanne Chan						
LAWJ	1492	86	~Seminar	1.00	A	4.00	
	Joanne Chan						
LAWJ	1492	88	~Fieldwork 3cr	3.00	P	0.00	
	Joanne Chan						
LAWJ	1538	05	Constitutional Law: The First and Second Amendments	1.00	P	0.00	
	Thomas Hardiman						
LAWJ	1778	08	Judicial Selection Process and Reforming the Supreme Court Seminar	2.00	A	8.00	
	Nan Aron						
LAWJ	396	05	Securities Regulation	4.00	P	0.00	
	Donald Langevoort						
LAWJ	524	08	Supervised Research	2.00	A	8.00	
	Donald Langevoort						

Transcript Totals

	EHrs	QHrs	QPts	GPA
Current	15.00	7.00	28.00	4.00
Annual	27.00	16.00	60.66	3.79
Cumulative	85.00	52.00	186.32	3.58

End of Juris Doctor Record

Unofficial Transcript

811642881 Ashton P. Jones-Doherty
Nov 04, 2020 01:07 pm

This is not an official transcript. Courses which are in progress may also be included on this transcript. Please refer all other transcript needs to the Office of the Registrar.

The “PASSED HOURS” column should be ignored. It is used for calculations by the Board of Regents. Students should view “EARNED HOURS” instead.

If you received a grade of “NG", your instructor did not report your grade. Please contact the instructor of the course for assistance.

A grade of “I” (or "I*" for a course graded S/U) means incomplete. No more than 3 semesters may be allowed to complete the work of the course. If a grade of “I” is not satisfactorily removed after three semesters, the “I” grade will be converted to an “F” (or “U” for a course graded S/U) by the Office of the Registrar.

Transfer credit may not appear in chronological order. The order in which transfer credit is posted is determined by the order in which it is received by UGA Undergraduate Admissions.

Transcripts will include all college level coursework from previously attended institutions regardless of whether UGA awarded transfer credit.

Please contact the Office of the Registrar at 706-542-4040 with any questions. Please note that federal privacy laws prevent discussion of the specific content of your transcript over the telephone.

Transfer Credit Institution Credit Transcript Totals

Transcript Data

STUDENT INFORMATION

Name : Ashton P. Jones-Doherty

Birth Date: 18-SEP

Curriculum Information

Program

Bachelor of Arts

College: School of Pub and Intl Aff

Major and Department: Political Science, Political Science

***Transcript type:Unofficial Web is NOT Official ***

DEGREE AWARDED

Awarded: Bachelor of Arts **Degree Date:** May 10, 2019

Institutional Magna Cum Laude

Honors:

Curriculum Information

Primary Degree

College: School of Pub and Intl Aff

Major: Political Science

TRANSFER CREDIT ACCEPTED BY INSTITUTION -Top-

Fall 2014: Clayton State U

Subject	Course	Title	Grade	Credit Hours	Quality Points		R
HIST	2111	Am History to 1865	A	3.000		12.00	
MATH	1GXX	Gen Ed Core Elective	B	3.000		9.00	
PSYC	1101	Elem Psychology	A	3.000		12.00	
SPAN	1GXX	Gen Ed Core Elective	A	3.000		12.00	I

	Attempt Hours	Passed Hours	Earned Hours	GPA Hours	Quality Points	GPA
Current Term:	12.000	12.000	12.000	12.000	45.00	3.75

Unofficial Transcript

Spring 2015: Clayton State U

Subject	Course	Title	Grade	Credit Hours	Quality Points		R
ECON	2106	Prin Of Microecon	A	3.000		12.00	
ENGL	1101	English Comp I	A	3.000		12.00	
POLS	1101	American Government	A	3.000		12.00	
STAT	1GXX	Gen Ed Core Elective	A	3.000		12.00	

	Attempt Hours	Passed Hours	Earned Hours	GPA Hours	Quality Points	GPA
Current Term:	12.000	12.000	12.000	12.000	48.00	4.00

Unofficial Transcript

Fall 2015: Clayton State U

Subject	Course	Title	Grade	Credit Hours	Quality Points		R
CMLT	2212	World Literature II	A	3.000		12.00	
ENGL	1102	English Comp II	A	3.000		12.00	
PHIL	2010	Intro To Philosophy	WP	3.000		0.00	
SCIE	1GXX	Transfer - Science	A	3.000		12.00	

	Attempt Hours	Passed Hours	Earned Hours	GPA Hours	Quality Points	GPA
Current Term:	12.000	9.000	9.000	9.000	36.00	4.00

Unofficial Transcript

Spring 2016: Clayton State U

Subject	Course	Title	Grade	Credit Hours	Quality Points	R
ENGL	2330	Am Lit To 1865	A	3.000	12.00	
SOCI	1101	Intro Sociology	A	3.000	12.00	
SPAN	1GXX	Gen Ed Core Elective	B	3.000	9.00	I

	Attempt Hours	Passed Hours	Earned Hours	GPA Hours	Quality Points	GPA
Current Term:	9.000	9.000	9.000	9.000	33.00	3.66

Unofficial Transcript

INSTITUTION CREDIT -Top-

Term: Summer 2016

Academic Standing: Good Standing

Subject	Course	Level	Title	Grade	Credit Hours	Quality Points	R
INTL	1100	UG	Intro Global Issues	A	3.000	12.00	

Term Totals (Undergraduate)

	Attempt Hours	Passed Hours	Earned Hours	GPA Hours	Quality Points	GPA
Current Term:	3.000	3.000	3.000	3.000	12.00	4.00
Cumulative:	3.000	3.000	3.000	3.000	12.00	4.00

Unofficial Transcript

Term: Fall 2016

Academic Standing: Good Standing

Subject	Course	Level	Title	Grade	Credit Hours	Quality Points	R
COMM	1100	UG	Intro Public Speak	W	3.000	0.00	
ENGL	3100	UG	Intro Brit Culture	A	3.000	12.00	
GEOG	1111	UG	Intro Phys Geog	A-	3.000	11.10	
GEOG	1111L	UG	Intro Phy Geog Lab	B+	1.000	3.30	
INTL	3300	UG	Intro to Comp Pol	A	3.000	12.00	
PHIL	2010	UG	Intro to Philosophy	A	3.000	12.00	

Term Totals (Undergraduate)

	Attempt Hours	Passed Hours	Earned Hours	GPA Hours	Quality Points	GPA
Current Term:	16.000	13.000	13.000	13.000	50.40	3.87

Cumulative:	19.000	16.000	16.000	16.000	62.40	3.90

Unofficial Transcript

Term: Spring 2017

Academic Standing: Good Standing

Additional Standing: Dean's List

Subject	Course	Level	Title	Grade	Credit Hours	Quality Points	R
FYOS	1001	UG	First Year Odyssey	A	1.000	4.00	
GEOG	3180	UG	Global Climate Change	A	3.000	12.00	
INTL	4260	UG	Dec Making Intl Rel	A	3.000	12.00	
INTL	4780	UG	Special Topics in Compar Pol	A	3.000	12.00	
LATN	1001	UG	Elementary Latin I	B	4.000	12.00	

Term Totals (Undergraduate)

	Attempt Hours	Passed Hours	Earned Hours	GPA Hours	Quality Points	GPA
Current Term:	14.000	14.000	14.000	14.000	52.00	3.71
Cumulative:	33.000	30.000	30.000	30.000	114.40	3.81

Unofficial Transcript

Term: Summer 2017

Academic Standing: Good Standing

Additional Standing: Dean's List

Subject	Course	Level	Title	Grade	Credit Hours	Quality Points	R
INTL	4720	UG	Intl Aff Internship	S	4.000	0.00	
INTL	4721	UG	Intl Aff Intern Res	A-	4.000	14.80	

Term Totals (Undergraduate)

	Attempt Hours	Passed Hours	Earned Hours	GPA Hours	Quality Points	GPA
Current Term:	8.000	8.000	8.000	4.000	14.80	3.70
Cumulative:	41.000	38.000	38.000	34.000	129.20	3.80

Unofficial Transcript

Term: Fall 2017

Academic Standing: Good Standing

Subject	Course	Level	Title	Grade	Credit Hours	Quality Points	R
ENGL	4960H	UG	Directed Reading	A	3.000	12.00	
GEOG	4040	UG	Global Environmental Change	A	3.000	12.00	

POLS	4040	UG	Amer Pol Thought	A	3.000	12.00
POLS	4710H	UG	Constitutional Law Civil Lib H	A-	3.000	11.10

Term Totals (Undergraduate)

	Attempt Hours	Passed Hours	Earned Hours	GPA Hours	Quality Points	GPA
Current Term:	12.000	12.000	12.000	12.000	47.10	3.92
Cumulative:	53.000	50.000	50.000	46.000	176.30	3.83

Unofficial Transcript

Term: Spring 2018

Term Comments: Study Abroad Oxford, UK

Academic Standing: Good Standing

Subject	Course	Level	Title	Grade	Credit Hours	Quality Points	R
ENGL	2320	UG	Eng Lit Since 1700	A-	3.000	11.10	
HIST	4373	UG	Eur Intel 1815-1914	A	3.000	12.00	
POLS	4325	UG	British Politics	A-	3.000	11.10	
POLS	4780	UG	Spec Topics Law	A	3.000	12.00	

Term Totals (Undergraduate)

	Attempt Hours	Passed Hours	Earned Hours	GPA Hours	Quality Points	GPA
Current Term:	12.000	12.000	12.000	12.000	46.20	3.85
Cumulative:	65.000	62.000	62.000	58.000	222.50	3.83

Unofficial Transcript

Term: Fall 2018

Academic Standing: Good Standing

Subject	Course	Level	Title	Grade	Credit Hours	Quality Points	R
PEDB	1950	UG	FFL Walking	S	1.000	0.00	
PHIL	3010	UG	Modern Philosophy	A	3.000	12.00	
POLS	3000	UG	Intro to Political Theory	A	3.000	12.00	
POLS	4730	UG	Criminal Law	A	3.000	12.00	
SPAN	2001	UG	Intermediate Spanish I	C	3.000	6.00	

Term Totals (Undergraduate)

	Attempt Hours	Passed Hours	Earned Hours	GPA Hours	Quality Points	GPA
Current Term:	13.000	13.000	13.000	12.000	42.00	3.50
Cumulative:	78.000	75.000	75.000	70.000	264.50	3.77

Unofficial Transcript

Term: Spring 2019

Academic Standing: Good Standing

Additional Standing: Dean's List

Subject	Course	Level	Title	Grade	Credit Hours	Quality Points	R
POLS	4790	UG	Sp Topics Amer Pol Field Study-Wash Semester Prog	A-	3.000	11.10	
POLS	5130	UG	Fed St Local Intern Field Study-Wash Semester Prog	S	4.000	0.00	
POLS	5132	UG	Fed St Loc Int Essy Field Study-Wash Semester Prog	A	4.000	16.00	
WASH	3400	UG	Washington Seminar Field Study-Wash Semester Prog	S	3.000	0.00	

Term Totals (Undergraduate)

	Attempt Hours	Passed Hours	Earned Hours	GPA Hours	Quality Points	GPA
Current Term:	14.000	14.000	14.000	7.000	27.10	3.87
Cumulative:	92.000	89.000	89.000	77.000	291.60	3.78

Unofficial Transcript

TRANSCRIPT TOTALS (UNDERGRADUATE) -Top-

	Attempt Hours	Passed Hours	Earned Hours	GPA Hours	Quality Points	GPA
Total Institution:	92.000	89.000	89.000	77.000	291.60	3.78
Total Transfer:	45.000	42.000	42.000	42.000	162.00	3.85
Overall:	137.000	131.000	131.000	119.000	453.60	3.81

Unofficial Transcript

Privacy

RELEASE: 8.7.1 SITE MAP

BAILEY GLASSER LLP

950 West Bannock Street
Suite 940
Boise, ID 83702
Tel: 208.342.4411
Fax: 208.342.4455

Nicholas A. Warden
nwarden@baileyglasser.com

May 19, 2023

RE: Recommendation of Ashton P. Jones-Doherty for Clerkship

To Whom It May Concern:

My name is Nick Warden and I am a partner with the firm Bailey & Glasser, LLP. I have had the pleasure of working with Ashton throughout this past year.

Ashton possesses a level of legal acumen and quality of legal research and writing beyond his years. Research and writing are areas in which he particularly excels, and his abilities exceed that of any associate I have worked with. He is sharp, creative, and thorough. He is also diligent and efficient and the work product he delivers is always polished and of high quality.

Ashton and I work on a case in which we represent a hedge fund seeking to recover approximately $500 million in investments they lost due to fraud. The case is large, high stakes, and highly complex. Ashton's contribution to that litigation has been invaluable. He is the laboring oar on most projects. And yet, he volunteers for work even when he is already grappling with a challenging task. He never shies away from a task regardless of complexity or importance. No task is beneath him or beyond him and he is enthusiastic regardless. From my observation, his primary motivations are intellectual rigor and an opportunity to help others. He is always ready to help the team no matter what needs to be done.

Ashton is also an effective communicator. I never wonder what stage of a project he is in and the work I receive is always high quality and what I ask for. As a result, the managerial and supervisory burden of working with Ashton is negligible.

I think a position in your chambers would be a perfect fit for Ashton. He will be doing what he loves and what he does best, and I have no doubt that you will enjoy the experience of working with him.

Hire Ashton. I guarantee you will not regret it.

Sincerely,

Nicholas A. Warden

BAILEY GLASSER LLP
1055 Thomas Jefferson St. NW
Suite 540
Washington, DC 20007
Tel: 202.463.2101
Fax: 202.463.2103

STEPHEN SORENSEN
ssorensen@baileyglasser.com

May 14, 2023

Re: Ashton Jones-Doherty

To Whom It May Concern:

I am a partner at the law firm Bailey Glasser, and write to provide my unqualified and strong recommendation for Ashton Jones-Doherty for a clerkship with your Honor.

I have had the pleasure of working with Ashton over the last year on a number of complex litigation matters. I believe he would excel as a clerk for a number of reasons.

First, Ashton is a tremendous researcher and writer. I have come to rely on him to research very complicated issues relating to financial, professional liability and Federal securities matters. He always gets up to speed quickly on the facts and legal issues of the case. His research is invariably comprehensive, and he often identifies legal nuances missed by others. Ashton enjoys diving deeply into complicated issues, as witnessed by his forthcoming law review article analyzing the effect of the *Hobby Lobby* case. His writing is clear, crisp and precise. He also is able to think creatively about issues and write effectively to persuade. In an opposition to a party's motion to stay, Ashton compared granting motions to stay to diamonds—existent but rare. Ashton's draft briefs are always first-rate and file-ready.

Second, I understand that from Ashton that he wishes to expand his understanding of how judge's think, thereby helping to better advise clients and colleagues on litigation strategies. I have seen first-hand how his experience in Judge Timothy Kelly's chambers gave him an understanding of the nuts-and-bolts of litigation—from complaint to trial and all the motion practice in between. Clerking in your court will only deepen his knowledge and allow him to better understanding of judicial decision making, procedural rules and litigation in general.

Third, Ashton is a great colleague. I love having him on my teams because he is always fully committed to the case, and is willing to do whatever is necessary, however unglamorous, to make sure we deliver the best quality work product for our clients. He sets high standards for himself, and is willing to work hard on difficult issues.

Finally, Ashton's intellectual intensity is balanced by his good nature, sense of humor and general engagement with the world. Whether the discussion is literature, politics, hidden restaurant gems in Europe, it is always enjoyable to talk to Ashton.

In short, I cannot recommend Ashton highly enough, and believe he would be a great fit for your chambers. I have no doubt that Ashton would quickly become an indispensable asset to your chambers.

If you have any questions or would like to discuss Ashton's qualifications further, please feel free to contact me at (202) 445-7266 or ssorensen@baileyglasser.com.

Sincerely,

Stephen Sorensen

Georgetown Law
600 New Jersey Avenue, NW
Washington, DC 20001

August 02, 2023

The Honorable James Browning
Pete V. Domenici United States Courthouse
333 Lomas Boulevard, N.W., Room 660
Albuquerque, NM 87102

Dear Judge Browning:

Ashton Jones-Doherty has asked that I write to you in connection with his application for a judicial clerkship. A 2022 graduate of Georgetown University Law Center, Ashton was a student in a number of my classes, including a small section of first-year Contracts, and I thus came to know him quite well. He is currently an associate at the law firm of Bailey Glasser LLP in Washington, D.C.

Ashton is a delightful person, and quite smart. Far more than most students, he is fascinated by legal theory and history—in contrast to so many of his classmates interested mainly in that which produces good grades on a final exam. As you can see from his resume, he sought out a number of internships in settings—like the Department of Justice's Office of Legal Policy as well as the Natural Resources Division at DOJ—where he can satisfy his intellectual curiosity while honing his legal research and writing skills. He took this one step further by taking on an independent research project on the concept of corporate sovereignty in contemporary battles over power and privilege. From the beginning, Ashton's corporate sovereignty project promised to be an interesting one. He took the project much further than was necessary to get a good grade, and ended up with a paper for which he had multiple offers of publication. He finally chose an offer from the Arizona State Law Journal, an exceptional placement for someone just out of law school. I understand from Ashton that the article will soon be in print.

Finally, Ashton was an exemplary citizen of the Georgetown community, heavily engaged in involvement and service, including membership on Georgetown's Investment and Social Responsibility Committee.

Based on all this, I think that Ashton would be a very good law clerk. Please let me know if I can be of any further information.

Sincerely,

Donald C. Langevoort
Thomas Aquinas Reynolds Professor of Law

Donald Langevoort - langevdc@law.georgetown.edu

Ashton Peter Jones-Doherty

450 K Street N.W., Washington, D.C. 20001/ apj12@georgetown.edu / (678) 764-1325

Writing Sample

To Whom It May Concern:

The attached writing sample is a 15-page excerpt of my upcoming *Arizona State Law Journal* publication, "Morally Regulatable Lives: Corporate Sovereignty, the Rise of *Burwell v. Hobby Lobby*, and the Ironic Demise of The Walt Disney Company's Reedy Creek Improvement District." The paper argues:

> *Burwell v. Hobby Lobby* is a misunderstood case. Since the decision in 2014, scholars have split into two camps, debating *Hobby Lobby*'s religious liberty concerns. One camp argues *Hobby Lobby* unconstitutionally allows corporations the right to enact religiously motivated policies where the corporate purpose is purely secular, whereas the other camp argues *Hobby Lobby* simply affirms an ownership's right to control the corporation pursuant to their religious interests without government intervention. Both camps miss *Hobby Lobby*'s underlying reasoning, debating the religious liberty interests while ignoring the case's constitutional affirmation of corporate sovereignty.
>
> A corporate sovereign, or leviathan, exists when a company controls territory *and* develops moral regulation based on a company leadership's/ownership's values for their employees and/or customers, a power called soulcraft. By describing this phenomenon, this article advances *Hobby Lobby*'s debate by exploring the implications of a corporate ownership's "power to impose" moral regulation onto employees, the essential characteristic of sovereignty. In doing so, it defines *Hobby Lobby* as a broad constitutional protection of corporate sovereignty—a doctrine previously only affirmed in state statute, as with The Walt Disney Company's Reedy Creek Improvement District, or through pure corporate will, as with some company towns—not simply as a religious liberty case.
>
> Crucially, this article does not claim corporate sovereigns, like Hobby Lobby and Disney, are as powerful as states, but neither does it diminish their regulatory authority over Americans. In its reasoning and holding, *Hobby Lobby* constitutionally legitimizes corporations' sovereign power to morally regulate our lives. That power is formidable and should be acknowledged. This article explores why.

The excerpt is the paper's first part, entitled The Rise of *Burwell v, Hobby Lobby*, which discusses Supreme Court of the United States precedent, including *Hobby Lobby*, compared to corporate legal history and theory. Crucially, this part shows how *Hobby Lobby* continues this history and deviates from it, reimagining corporations as mirrors of its ownership.

The footnotes appear as they do in the manuscript; hence, the footnotes start at fifty-eight, given there are fifty-seven footnotes in the paper's introduction. All footnotes are *Bluebook* compliant.

The complete manuscript is available upon request. This sample is representative of only my work product; no other person has reviewed it.

Warmest Regards,
Ashton P. Jones-Doherty

Part One: The Rise of *Burwell v. Hobby Lobby*

"Since the dawn of capitalism," Margaret M. Blair observes, "corporations have been regarded by the law as separate legal 'persons.'"[58] The first corporations—a word that originates "from the Latin word corpus, meaning body[,] because the law recognized that the group of people who formed the corporation could act as one body or one legal person"[59]—were "quasi-governmental bodies" created by the state to exist independently with their own rights.[60] Being a composite body with rights, like the ability to form contracts, a corporation's purpose "was simply to make it clear … [that] the contracts [the corporation's membership] made were not entered into on [the membership's] personal behalf, but only in [the corporation's] official capacity."[61] That is, a corporation's purpose was to serve its official function—be it for a governmental end or, since at least the nineteenth century, for shareholder profit[62]—without creating membership liability for corporate actions. Corporate personhood was thus required to separate the corporation from its membership to avoid membership liability. It is an anti-liability tool for collective actions.

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[58]*See* Margaret M. Blair, *Of Corporations, Courts, Personhood, and Morality*, 25 BUS. ETHICS Q. 415, 415 (2015).
[59]*See* Margaret M. Blair, *Corporate Personhood and the Corporate Persona*, 2013 U. ILL. L. REV. 785, 788–89 (2013). This definition was shared by Scottish philosopher Stewart Kyd, who described corporations as:

> a collection of many individuals, united into one body [that has] perpetual succession under an artificial form [and is] vested by the policy of law, with the capacity of acting, in several respects, as an individual, particularly of taking and granting property, of contracting obligations, and of suing and being sued.

See STEWART KYD, A TREATISE ON THE LAW OF CORPORATIONS, vol. I, at 2–4, 7, 10, 13 (1793) (emphasis removed).
[60]*See* ANDREW LAMONT CREIGHTON, THE EMERGENCE OF INCORPORATION AS A LEGAL FORM FOR ORGANIZATIONS 34 (1990) (unpublished Ph.D. dissertation Stanford University) (ProQuest); *see also* Margaret M. Blair & Elizabeth Pollman, *The Supreme Court's View of Corporate Rights*, in CORPORATIONS AND AMERICAN DEMOCRACY 245, 250 (Naomi R. Lamoreaux & William J. Novak eds., 2017) ("[M]any if not all, of the corporations formed in the American colonies in the eighteenth century were formed to serve some public purpose and were regarded at least quasi-public in nature."); JOEL RICHARD PAUL, WITHOUT PRECEDENT: CHIEF JUSTICE JOHN MARSHALL AND HIS TIMES 373 (2018) ("[M]ost American corporations were municipal bodies created for a public purpose.").
[61]*See* Blair, *supra* note 59, at 789–91.
[62]*See* WINNIFRED FALLERS SULLIVAN, CHURCH STATE CORPORATION: CONSTRUING RELIGION IN US LAW 102 (2020) ("Historian Margaret [M.] Blair argues that the notion of the corporation as simply private and transactional did not actually take firm hold until after the creation of general incorporation acts in the mid-nineteenth century under which proof of public benefit was no longer required." (citing Blair, *supra* note 59, at 806)).

The anti-liability approach to corporate personhood is ancient. For example, to William Blackstone, perhaps the most influential English jurist because of his *Commentaries on the Laws of England*, corporations are "artificial persons."[63] Once an artificial person is formed, "[the corporation] and their successors are then considered as one person in law: as one person, they have one will, which is collected from the sense of the majority of the individuals: this one will may establish rules and orders for the regulation of the whole, which are a sort of municipal laws of this little republic."[64]

Blackstone makes two points in his description. First, corporations are independent legal entities "in the eyes of the law, separate and distinct from the people who formed it."[65] Second, corporations have legally enforceable rights similar to natural persons.[66] Each of these rights, to Blackstone, was exercised in its own name. The second point is crucial to Blackstone; he believed:

> The members of the corporation did not own the corporation's property, the corporation did. The members of the corporation were not personally bound by the corporation's contracts, the corporation was. The members of the corporation could not sue or be sued for legal controversies involving the corporation, only the corporation could. Corporations were their own independent entities under the law, separate and distinct from their members and with certain rights deserving of protection.[67]

While Blackstone's understanding of corporate personality is ancient—in fact, Edward Coke in 1612, a mere 153-years prior to Blackstone's *Commentaries*, defined the corporation through Roman law as "invisible, immortal, and rests only in the … consideration of the law"[68]—it is not an outdated understanding.[69] Corporate personhood defined through strict separation between the corporate entity and its membership is American corporate law's cornerstone.

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[63] 1 WILLIAM BLACKSTONE, COMMENTARIES *455–56.
[64] *Id.* at *456.
[65] *See* ADAM WINKLER, WE THE CORPORATIONS: HOW AMERICAN BUSINESSES WON THEIR CIVIL RIGHTS 47 (2018).
[66] *Id.*
[67] *Id.*
[68] *See Case of Sutton's Hospital*, 77 Eng. Rep. 960, 973 (1612).
[69] *See* Winkler, *supra* note 65, at 51 ("Blackstone's understanding of the corporation is old but hardly outdated.").

Chief Justice John Marshall—using English Law for his decision in *Trustees of Dartmouth College v. Woodward*,[70] one of the first Supreme Court of the United States decisions on corporate rights—famously described the American corporation as:

> [A]n artificial being, invisible, intangible, and existing only in contemplation of law. Being the mere creature of law, it possesses only those properties which the charter of its creation confers upon it, either expressly or as incidental to its very existence.[71]

Likewise, George Field, in his *Treatise on the Law of Corporation*, published in 1877, fifty-eight years after *Dartmouth College*, defined a corporation as a "'legal person' whose acts 'are considered those of the body, and not those of the members composing it.'"[72] Similarly, in the twentieth century, Robert Charles Clark, the then dean of Harvard Law School, wrote: "'[o]ne of the law's most economically significant contributions to business … has been the creation of fictional but legally recognized entities or 'persons' that are treated as having some of the attributes of natural persons.'"[73] In turn, by echoing Coke and Blackstone,[74] American law has consistently described the corporation as an "artificial person," which remains, according to the Supreme Court

[70] *See* Philip Blumberg, *The Corporate Personality in American Law*, 38 AM. J. OF COMPAR. L. 49, 49 (1990).
[71] *See Trs. of Dartmouth Coll. v. Woodward*, 17 U.S. 518, 634–36 (1819). *Dartmouth College* was not the first corporate law case before the court; that case was *Bank of the United States v. Deveaux*, 9 U.S. 61 (1809), where the Court found "[t]he invisible, intangible, and artificial being, that mere legal entity, a corporate aggregate, is certainly not a citizen." *See id.* at 86; David Ciepley, *Member Corporations, Property Corporations, and Constitutional Rights*, 11 LAW & ETHICS HUM. RTS. 31, 32 (2017) ("They are held by the corporation itself, as a distinct legal entity, separate from the rights of the natural persons that associate with it. Of course, all of a corporation's rights have to be exercised by natural persons acting in its name as its agents and fiduciaries, since the corporation, as a bare legal entity, cannot act. But the consequences of their exercise are legally attributed to the corporation, not the actors.").
[72] *See* WINKLER, *supra* note 65, at 51 (*quoting* GEORGE FIELD, A TREATISE ON THE LAW OF CORPORATIONS 1 (1877)).
[73] *Id.*
[74] *See* Ciepley, *supra* note 71, at 53 ("The wording [of American case law] echoes Blackstone and Coke…."); Blumberg, *supra* note 70, at 49 ("The corporation was a creation of the legislature with certain 'core' rights including the capacity to sue and be sued, the capacity to hold and transfer property, and to have perpetual existence, irrespective of any change in its shareholders. This view has been alternatively called the *artificial person*, or *fiction*, or *concession* or *grant* doctrine.").

of the United States in 2001, a principle ingrained in our economic and legal systems.[75] Yet, while both accepting "corporations have a real underlying social identity of their own, distinct from the identities of the people who form them"[76] *and* agreeing "[a] rights-bearing entity is simply what a corporation *is*,"[77] corporate personhood "is one of the most misunderstood doctrines in American legal history" because legal scholars and philosophers have struggled with defining and separating the legal person from its membership.[78] The Supreme Court, despite its ruling in *Dartmouth College* and its 2001 reaffirmance, is no exception.

In *The Commerce Clause Under Marshall, Taney, and Waite*, Associate Justice Felix Frankfurter declared "[t]he history of American constitutional law in no small measure is the history of the impact of the modern corporation."[79] This is ironic as the word "corporation" appears nowhere in the text of the U.S. Constitution.[80] Lacking express protections has—according to Adam Winkler, Elizabeth Pollman, Margaret Blair, and others—resulted in an revolution in corporate law.[81] The Court has been the prime mover of this revolution, which has ignored Blackstone's artificial persons and instead focused on the corporation's membership—

[75] *See Cedric Kushner Promotions, Ltd v. King*, 533 U.S. 158, 158 (2001) ("The corporate owner/employee, a natural person, is distinct from the corporation itself, a legally different entity with different rights and responsibilities due to its different legal status.").
[76] *See* Michael J. Phillips, *Reappraising the Real Entity Theory of the Corporation*, 21 FLA. ST. U. L. REV. 1061, 1075 (1994) (citing John Dewey, *The Historical Background of Corporate Legal Personality*, 35 YALE L.J. 655, 673 (1926)).
[77] *See* Ciepley, *supra* note 71, at 31 (emphasis in original).
[78] *See* Blair, *supra* note 59, at 810.
[79] *See* FELIX FRANKFURTER, THE COMMERCE CLAUSE UNDER MARSHALL, TANEY, AND WAITE 63 (1937).
[80] *See* Ciepley, *supra* note 71, at 35.
[81] *See generally* WINKLER, *supra* note 65, at 395 ("The Supreme Court has contributed to … looking through the corporate form and basing the rights of the corporation on the rights of the people associated together within it."); Blair & Pollman, *supra* note 60, at 285 (concluding that, prior to *Hobby Lobby*, the Supreme Court had "recognize[d] corporate rights only when it [was] necessary to protect the rights of human persons represented by the corporation").

known as "natural persons," who are expressly protected by the Constitution—in order to secure corporate Constitutional rights.[82] This revolution is dubbed associational theory.[83]

This Part, first, reviews this revolution and then compares it to the countermovement advocating strict Blackstonian personhood—before defining how *Hobby Lobby* is a product of the former and a rejection of the latter.

A. The Revolution: Associational Theory

In his seminal essay, "Santa Clara Revisited: The Development of Corporate Theory," Morton J. Horwitz was perhaps the first legal scholar to notice—ironically, since the revolution happened in plain sight—the Supreme Court's development of associational theory.[84] Horwitz discussed what he calls "the real meaning of the *Santa Clara* [*County v. Southern Pacific Railroad*] Decision"[85]—a 1886 case often attributed to crystalizing corporate personhood rights and the holding that the Fourteenth Amendment applied to corporations just as it applied to natural persons.[86] In fact, Horwitz argued that the case did not affirm corporate personhood. Rather, "the

[82] *See generally* WINKLER, *supra* note 65, at 395; Blair & Pollman, *supra* note 60, at 285.
[83] *See generally* WINKLER, *supra* note 65, at 395; Blair & Pollman, *supra* note 60, at 285.
[84] Horwitz's purpose in "Revisited" was not to outline the development of the associational theory, unlike his successors. In fact, he does not use the term associational theory in his essay. Instead, the paper's purpose was to question Legal Realism's conclusion that personhood theory was a "major factor in legitimating big business," since the court looks to natural persons for constitutional rights, not corporations. *See* Morton J. Horwitz, *Santa Clara Revested: The Development of Corporate Theory*, 88 W. VA. L. REV. 173, 176 (1986).
[85] *Id.*
[86] *Santa Clara Cnty. v. S. Pac. R.R. Co.,* 118 U.S. 394 (1886) (holding that the Fourteenth Amendment applied to corporations as equally as natural persons). It is possible the Supreme Court's agreement in *Santa Clara* was fabricated. According to Adam Winkler, the Supreme Court's Reporter of Decisions, J. C. Bancroft Davis—who was given exclusive rights to sell the *United States Reports*, the official bound versions of the Supreme Court's opinions and used by every lawyer in the nineteenth century who practiced before the Court—inserted the following:

> One of the points made and discussed at length in this brief of counsel for defendants in error was that "corporations are persons within the meaning of the Fourteenth Amendment to the Constitution of the United States." Before Argument, Mr. CHIEF JUSTICE WAITE said "The Court does not wish to hear argument on the question whether the provision in the Fourteenth Amendment to the Constitution which forbids a state to deny to any person within its jurisdiction that equal protection of the laws applies to these corporations. We are all of the opinion that it does."

See WINKLER, *supra* note 65, at 149–52. This insertion was, apparently, without the Court's consent, setting off a firestorm within the Court and caused Davis to be personally remained by Chief Justice Waite, based on the Court

Supreme Court's use of the word person in this context was not intended to constitute recognition of the corporate entity as an independent, rights-bearing entity, but … was an assertion that the corporation was a stand-in for the natural persons that formed the corporation and owned its shares."[87] Supporting his argument, Horwitz points to John Norton Pomeroy's brief for Southern Pacific Railroad in *Santa Clara*'s companion case, *San Mateo v. Southern Pacific Railroad*. Pomeroy argues that both state and federal constitutional provisions:

> apply … to private corporation[s], not alone because such corporations are "persons" within the meaning of that word, but because *statues violating their prohibitions in dealing with corporations must necessarily infringe upon the rights of natural persons.* In applying and enforcing these constitutional guaranties, *corporations cannot be separated from the natural persons who compose them*.[88]

This conclusion, Pomeroy argues, is intrinsic to our legal principles:

> Whatever be the legal natural of a corporation as an artificial, metaphysical being, separate and distinct from the individual members … in carrying out the technical legal conception, between property of the corporation and that of the individual members … *these metaphysical and technical notions must give way to the reality*. The truth cannot be evaded that, *for the purpose of protecting rights, the property of all business and training corporations* IS *the property of the individual corporators*. A State act depriving a business corporation of its property without due process of law, does in fact *deprive the individual corporators of their property.* In this sense, and within the scope of these grand safeguards of private rights, there is no real distinction between artificial persons or corporations, and natural persons.[89]

The Ninth Circuit's opinion, authored by Associate Justice Stephen J. Field, an ardent supporter of expansive corporate rights and a joiner of the majority in *Santa Clara*, practically plagiarized Pomeroy's brief; Field wrote:

> Private corporations are it is, true artificial persons, but … they consist of aggregations of individuals united for some legitimate business … It would be a

had not ruled on the Fourteenth Amendment's applicability to corporate rights. *See id.* at 151–52. Yet, ironically, it is this insertion that is given as proof that the Fourteenth Amendment protects corporate rights. *See id.* at 153.

[87] *See* Blair, *supra* note 58, at 803.

[88] *See* Horwitz, *supra* note 84, at 177 (*quoting* Argument for Defendant, *Cnty. of San Mateo v. S. Pac. R.R. Co.*, 116 U.S. 138 (1882)) (emphasis in original).

[89] *See id.* at 178 (*quoting* Argument for Defendant, *Cnty. of San Mateo v. S. Pac. R.R. Co.*, 116 U.S. 138 (1882)) (emphasis in original).

> most singular result if a constitutional provision intended for the protection of every person against partial and discriminating legislation by the states, should cease to exert such protection the moment the person becomes a member of a corporation … On the contrary we think … the courts will always look beyond the name of the artificial being to the individual whom it represents [when deciding if a constitutional right has been infringed].[90]

Field's opinion, Pomeroy's argument, and the Court's opinion in *Santa Clara* are thus a revolutionary shift from Blackstone's artificial persons. The Court—likely through the help of fabrication—rejected centuries old personhood theory and created a theory where corporate personhood is simply there to protect the rights of individuals.[91] The corporation, according to this theory, is a jambalaya of individuals pursuing a singular interest via a collective body. Thus, courts *must* protect these individuals over any fictious artificial person, itself only a symbol of collective private actions.

To be sure, while the Supreme Court's decision in *Santa Clara* was the first time the Court adopted associational theory, the Supreme Court did not invent the theory. Horwitz credits Victor Morawetz's 1882 treatise, *A Treatise on the Law of Private Corporations*, as crafting the "first sustained effort" of defining associational theory.[92] The corporation, to Morawetz, "is really an association formed by the agreement of its shareholders, and … the existence of a corporation as an entity, independently of its members, is a fiction."[93] Morawetz's idea was quickly adopted.

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[90] *Cnty. of San Mateo v. S. Pac. R.R. Co. (The Railroad Tax Cases)*, 13 F. 722, 746–48 (C.C.D. Cal. 1882).
[91] *See* Horwitz, *supra* note 84, at 178 ("Only this … theory can truly be said to personify the corporation and treat it 'just like individuals.'"); *see also supra* note 86.
[92] *See The Railroad Tax* Cases, 13 F. at 203.
[93] *Id.*; *see also* VICTOR MORAWETZ, A TREATISE ON THE LAW OF PRIVATE CORPORATIONS, at iii (2d ed. 1886).
However, according to Winkler, Horace Binney is the real source of the associational theory. While I am doubtful that Binney's theory was associational theory, as he did not use veil piercing logic, a principal piece of the theory, *see infra* notes 112 and 115, Winkler argues:

> [C]orporations and their members were not separate and distinct entities when it came to the Constitution. Instead, Binney argued, corporations were associations of individuals, and corporations should be able to assert the same rights as the people who come together within them. Unlike veil piercing in corporate law, which is used to extend the liability of the corporation to its members, Binney's version sought to extend the rights of the members to the corporation. Binney's way of thinking about corporations would be repeated often by corporationalists throughout

Echoing Morawetz in 1885, only a year before *Santa Clara*, Henry O. Taylor, in his *Treatise on the Law of Private Corporations Having Capital Stock*, sought to "dismiss[] this fiction" of corporate legal personality so that "a clearer view" of the rights of natural persons could be determined "without unnecessary mystification."[94] Morawetz and Taylor's ideas were a radical departure from corporate law's personhood heritage: Blackstone's artificial persons were rejected in favor of preserving the rights of natural persons, regardless of whether a natural person was acting individually or through a collective body.

This idea has been an extraordinarily influential—perhaps one of the most significant ideas in legal history—for it is undeniable Morawetz and Taylor's ideas motivated the Court's opinion in *Santa Clara*, given, according to Horwitz, the idea "was supported by John Norton Pomeroy, the California lawyer who was simultaneously putting forth this argument on behalf of the corporation in the *Santa Clara* case."[95] This influence has continued unabated for more than a century. The Supreme Court no longer cared that the corporation was a creature of the state; instead, the Court along with "business people, judges, lawyers, and legal scholars began to think of corporations as having been created by the people who came together to form them."[96] In turn, the Court's jurisprudence began to focus on the corporation's membership as opposed to the corporation itself.

The Supreme Court has routinely, especially after Reconstruction, protected the constitutional rights of corporations—using association theory to do so. In total, corporations have been granted several rights: corporations are "persons" under the Constitution for diversity

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American history and ultimately prove to be profoundly influential in shaping constitutional rights for corporations.

See WINKLER, *supra* note 65, at 52–70.

[94] *See* HENRY O. TAYLOR, A TREATISE ON THE LAW OF PRIVATE CORPORATIONS HAVING CAPITAL STOCK iv (1885); *see also* Horowitz, *supra* note 84, at 204.

[95] *See* Horowitz, *supra* note 84, at 204.

[96] *See* Blair, *supra* note 59, at 802.

jurisdiction purposes;[97] corporations are protected by the Fourteenth Amendment's Equal Protection and Due Process Clauses;[98] corporations have the Fifth Amendment Rights against unreasonable search and seizures, protection against double jeopardy, and some guarantees to jury trials;[99] corporations have expansive freedom of speech rights, including political speech rights, and any abridgement of free speech is subject to strict scrutiny;[100] and now corporations, at least those closely held, have religious freedom rights under RFRA.[101] Of course, the Supreme Court has denied some constitutional rights to corporations; for example, corporations are not considered "citizens" for the Privileges and Immunities clause of Article IV;[102] and corporations have no Fifth Amendment protections against self-incrimination.[103] Yet, despite the Supreme Court withholding a few constitutional protections, the Court's jurisprudence has been remarkably expansive and has "generally justified its granting of Constitutional rights to corporations not on a theory that corporations are themselves Constitutionally protected persons, as sometimes claimed, but on the logic that a corporation is an association of persons acting together."[104] Put differently, the Supreme Court has thoroughly adopted Morawetz and Taylor's ideas: it is an associational theory institution.

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[97] *See generally Bank of the U.S. v. Deveaux*, 9 U.S. 61, 62 (1809); *Louisville, C. & C.R. Co. v. Letson*, 43 U.S. 497, 550 (1844); *Marshall v. Balt. & Ohio R.R. Co.*, 57 U.S. 314, 335 (1853); *Dodge v. Woolsey*, 59 U.S. 331, 379 (1855).
[98] *See Santa Clara Cnty*, 148 U.S. at 397.
[99] *See generally Hale v. Henkel*, 201 U.S. 43, 83 (1906) (unreasonable search and seizures); *United States v. Martin Linen Supply Co.*, 430 U.S. 564, 567 (1977) (double jeopardy); *Ross v. Bernhard*, 396 U.S. 531, 532–33 (1970) (jury trials).
[100] *See generally Va. Citizens Consumer Council, Inc. v. State Bd. of Pharmacy*, 373 F. Supp. 683, 684 (E.D. Va. 1974), *aff'd sub nom. Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council, Inc.*, 425 U.S. 748, 748 (1976) (commercial speech rights); *Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'm*, 447 U.S. 557, 560–61 (1980) (commercial speech rights); *Citizens United v. Fed. Election Comm'm*, 558 U.S. 310, 881 (2010) (political speech rights); *First Nat. Bank of Bos. V. Bellotti*, 435 U. S. 765, 788–79 (1978) (strict scrutiny application).
[101] *See Hobby Lobby*, 573 U.S. at 683–87.
[102] *See Bank of Augusta v. Earle*, 38 U.S. 519, 596–97 (1839); *see also* RANDY E. BARNETT & EVAN D. BERNICK, THE ORIGINAL MEANING OF THE 14TH AMENDMENT: ITS LETTER & SPIRIT 22–30 (2021) (discussing how the Supreme Court has interpreted the Privileges and Immunities Clause of Article IV and the Fourteenth Amendment).
[103] *See Hale*, 201 U.S. at 83 (Brewer, J., dissenting).
[104] *See* Blair, *supra* note 59, at 421.

B. The Countermovement: Personhood Theory

The Supreme Court's adoption of association theory has not been universally accepted by *all* members of the Court; there has been a countermovement to decide corporate rights based on personhood theory. Although this paper is not a comprehensive overview of the Supreme Court's corporate law jurisprudence, it is important to emphasize this countermovement as having significant successes, especially during the Antebellum period. While members of this countermovement include Chief Justice William H. Rehnquist[105] and Associate Justice Hugo L. Black,[106] the most successful member is Chief Justice Roger B. Taney, whose corporate law decisions affirming corporate personhood have been overshadowed, rightfully, by his majority opinion in *Dred Scott v. Sandford*, where the Court rejected African Americans' legal rights under the Constitution.[107] It is a deep irony, then, that the *same* Supreme Court—who thought blacks were afforded no Constitutional rights—believed corporations have Constitutional rights because

[105] In *Virginia Pharmacy*, then Associate Justice "Rehnquist was the sole dissenter—and the only justice who foresaw the far-reaching implications of extending First Amendment protections to commercial advertising." *See* MICHAEL J. GRAETZ & LINDA GREENHOUSE, THE BURGER COURT AND THE RISE OF THE JUDICIAL RIGHT 248 (2016).

> Rehnquist presciently predicted that "surely the difference between pharmacists' advertising and lawyers' and doctors' advertising can be only one of degree and not of kind." "Under the Court's opinion," Rehnquist said, "the way will be open not only for dissemination of price information but for active promotion of prescription drugs, liquor, cigarettes and other products the use of which has previously been thought desirable to discourage."

Id. (footnote omitted). This prediction would come to fruition *Central Hudson Gas and Electric Co. v. Public Service Commission*, where the Supreme Court ruled basically all prohibitions against commercial speech are unconstitutional. *See* 447 U.S. 557, 570–72 (1980).

[106] Justice Black famously detested an expansive reading of corporate constitutional rights. In Black's view, the Fourteenth Amendment provided the corporations no affirmative rights. *See* WINKLER, *supra* note 65, at 266. In *Connecticut General Life Insurance*, Black dissented by:

> Challenging a half-century of precedent recognizing corporations to have at least property rights under the Fourteenth Amendment, Black rested his case on the original meaning of the Fourteenth Amendment. No one who voted to ratify the Fourteenth Amendment knew they were "granting new and revolutionary rights to corporations," Black insisted. . . . [I]n Black's view, the Fourteenth Amendment was designed "to protect weak and helpless human beings," not "to remove corporations in any fashion from the control of state governments." People had constitutional rights; corporations did not.

Id. at 267.

[107] *See Dred Scott v. Sandford*, 60 U.S. 393, 459–60 (1857).

corporations, unlike African Americans, were "persons" under the Constitutions.[108] Nevertheless, Taney's majority opinion in *Bank of Augusta v. Earle* is the apotheosis of the Supreme Court's personhood jurisprudence. In rejecting Daniel Webster's associational theory argument for the Bank of Augusta that "the [C]ourt should look behind the act of incorporation and see who are the members of it," Taney held that:

> [T]he corporation "is a person for certain purposes in contemplation of law." "Whenever a corporation makes a contract, it is the contract of the legal entity—of the artificial being created by the charter—and not the contract of the individual members. The only rights it can claim are the rights which are given to it in that charter, and not the rights which belong to its members as citizens of a state." In Taney's view, corporate personhood required a strict separation between the rights of the corporation and the rights of its members.[109]

As a result, *Bank of Augusta* illustrates the Supreme Court has not always adopted the associational theory. Faced with Daniel Webster's associational theory argument, the Court choose to reject it. Regardless, Taney's personhood precedent remains essentially isolated to the Constitution's Article IV Privileges and Immunities Clause. And in mainly rejecting personhood theory, the Supreme Court choose a different path, the associational theory. Its reasoning, as has been shown above, routinely protects the rights of natural persons over corporations themselves.

C. The Revolution's Progeny: Burwell v. Hobby Lobby

Because associational theory protects the rights of a corporation's membership over the corporation itself, scholars have consistently described the theory as using a piercing-the-corporate-veil logic, meaning the Supreme Court looks "right through the corporate form and bas[es] the rights of the corporation on the rights of the people associated together within it."[110]

[108] *See* WINKLER, *supra* note 65, at 110 (Taney, who wrote the infamous line about African Americans having 'no rights which the white man was bound to respect,' thought blacks were not legal persons but corporations were." (*quoting Dred Scott v. Sandford*, 60 U.S. 393, 407 (1857))).
[109] *Id.*(*quoting Bank of Augusta v. Earle*, 38 U.S. 519, 587 (1839)).
[110] *See id.* at 395.

Using this theory, the Court has "rejected the core principle of corporate personhood: the independent legal standing of the corporation, with rights and duties separate and distinct from those of its members."[111] This much is true.[112] But describing the theory as using this logic obscures reality. Courts, when piercing-the-corporate-veil, assume a corporate form exists to be pierced,[113] *i.e.*, there is a strict separation between the corporation and its membership, whereas the Supreme Court's associational theory disregards the corporate form entirely. Certainly, the Supreme Court pays lip-service to, as Blair calls, the corporate persona, meaning Supreme Court decisions both mention corporations by name and usually reference the corporation as a creature of the state.[114] But the Supreme Court clearly believes the corporation and its membership cannot be separated; both the natural and artificial persons are "co-extensive," impossible to separate.[115] Justice Alito's majority opinion in *Burwell v. Hobby Lobby* illustrates this belief.

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[111] *Id.*

[112] The association theory is not universally accepted, although it is certainly the most prominent theory. For example, Professors Lyman Johnson and David Millon in "Corporate Law After *Hobby Lobby*" conclude that the Supreme Court's decision uses personhood theory: "The Supreme Court was correct to conclude that Hobby Lobby and the other corporations are 'persons' capable of 'exercising religion' for purposes of the RFRA," because no court, including the Delaware courts, have rejected corporate purposes beyond maximizing profit. *See* Lyman Johnson & David Millon, *supra* note 4, at 31. Likewise, Rachel Alexander in "The Constitutional Theory of *Burwell v. Hobby Lobby*" argues the Court treats conservative Christians as a "discrete and insular minority" that receives extra protection under the Court's Due Process jurisprudence. *See* Rachel Alexander, *The Constitutional Theory of Burwell v. Hobby Lobby*, 175 L. & JUST. 209, 214–26 (2015). In this sense, *Hobby Lobby* is not about corporate law at all, but it is about modern substantive due process. *Id.* Jennifer S. Taub similarly argues, although she does not outright reject associational theory, that *Hobby Lobby* does not expand corporate personhood powers, but is "a tool for limiting previously recognized corporate constitutional rights." *See* Jennifer S. Taub, *Is* Hobby Lobby *a Tool for Limiting Corporate Constitutional Rights?*, 30 CONST. COMMENT. 403, 403 (2015).

[113] The classic description of veil piercing is *Salomon v. A Salomon & Co Ltd.* [1895–99] All ER Rep. 33 (HL) (UK), where the House of Lords found that:

> [E]ither the limited company was a legal entity or it was not. If it was, the business belonged to it and not to Mr. Salomon … If it was not, there was no person and nothing to be an agent at all; and it is impossible to say at the same time there is a company and there is not.

Id. at 36. In other words, for a veil to be pierced, there must be an independent legal entity to being with.

[114] *See* Blair, *supra* note 59, at 809–814, 819–20.

[115] *See* Taub, *supra* note 114, at 417 (describing the *Hobby Lobby* decision as "see[ing] the business as co-extensive with the owners").

"Corporations," Justice Alito writes, "[that are] 'separate and apart from' the human beings who own, run, and are employed by them, cannot do anything at all."[116] While Alito's conclusion is reductionist, it is pragmatic—echoing John Dewey's famous argument that corporate "'perso[nhood]' signifies what the law makes it signify."[117] The opinion also applies associational theory. But crucially, Alito's reasoning does not use veil-piercing logic, as Winkler and others have claimed.[118] Rather, Alito is transforming Hobby Lobby from an artificial person, a separate and distinct legal entity, into a *mirror* of its membership: Hobby Lobby only *reflects* the actions of those human beings that own, run, and are employed by it.[119] And if it mirrors the corporation's membership, Hobby Lobby certainly reflects the moral, religious, and political values of its membership. In this sense, Alito cares little about looking "through the corporate form," as there is no form to truly begin with. Thus, there is no veil to pierce; there is no separation between corporation and membership. Instead, the corporation, to paraphrase Hilary Mantel, "is a pale actor who sheds no luster of [its] own, but spins in the reflected light of" its membership. If the membership's "light moves" the corporation "ceases to be."[120]

Fascinatingly, *Hobby Lobby* illuminates one more key aspect: It is the *first* Supreme Court case to define the association with, at least, for-profit companies, like Hobby Lobby.[121] Oddly, before *Hobby Lobby*, while the Supreme Court used associational theory reasoning to support its

[116] *See Hobby Lobby*, 573 U.S. at 707.
[117] *See* Dewey, *supra* note 76, at 655.
[118] *See* WINKLER, *supra* note 65, at 381 ("[T]he underlying logic of *Hobby Lobby* reflected instead piercing the corporate veil.").
[119] Analogizing the Supreme Court's associational theory as a "mirror" has been inspired by, in part, Richard Rorty's classic critique of Western philosophy as developing an unhealthy obsession with comparing the mind to a mirror that reflects reality. *See generally* RICHARD RORTY, PHILOSOPHY AND THE MIRROR OF NATURE 12–13 (1979). The Supreme Court, in comparison, treats the corporation as a mirror that reflects the membership's reality.
[120] *See* HILARY MANTEL, THE MIRROR AND THE LIGHT 617 (2020).
[121] *See* Blair, *supra* note 58, at 422 ("Th[ese] right[s] had been recognized previously for non-profit religiously-based corporations such as churches, charities, and religious schools, but prior to *Hobby Lobby*, the Court had never before recognized that for-profit corporations have, and should be free to exercise, religious beliefs.").

expansive reading of corporate rights, the Court never defined the association; it was deeply unclear *who* or *what* composed the association. Was the association the owners, the employees, the shareholders, or any person associated with the corporation? *Hobby Lobby* answered that question in its holding: "The *owners* of the businesses have religious objections to abortion, and according to their religious beliefs the four contraceptive methods at issue are abortifacients."[122] In this sense, the Court has taken a side in the public corporation versus private corporation debate.[123] According to Elizabeth Pollman, "[t]he public view sees the corporation as a concession of the state, tinged with a public purpose and subject to state regulation[, whereas t]he private view sees the corporation as a matter of private contract, property, and activity."[124] Justice Alito's opinion views a corporation as a private entity, where the *interests of the owners*, not the interests of either the state or the company's employees, is paramount. This decision, to view the association as *only* the owners, is—it cannot be stressed enough—extraordinarily consequential. It means that the Supreme Court requires lower courts to preference ownership interests over employee interests, at least, in matters where religion is integrated into company policy.

Importantly, the Supreme Court's definition of association as company ownership has been reaffirmed via reasoning in *Masterpiece Cakeshop, Ltd. v. Colorado Civil Rights Commission*, where the Supreme Court did not question whether the religious views of Masterpiece Cakeshop's owner and operator, Jack Philips, were legally separatable from the incorporate purpose of Masterpiece Cakeshop.[125] The fact that Jack Philips was making a religious freedom claim on behalf of his company was enough to justify the corporation has having the same purpose.[126]

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[122] *Hobby Lobby*, 573 U.S. at 691 (emphasis added).
[123] *See* Elizabeth Pollman, *Corporate Law and Theory in Hobby Lobby*, *in* THE RISE OF CORPORATE RELIGIOUS LIBERTY 155 (Micah Schwartzman, Chad Flanders, & Zoë Robinson eds., 2016).
[124] *Id.*
[125] *See* 138 S. Ct. 1719, 1724 (2018).
[126] *Id.*

Again, like in *Hobby Lobby*, the Supreme Court believes the corporation mirrors the religious interests of its ownership.

In sum, the Supreme Court's corporate constitutional rights jurisprudence is reasoned using the associational theory, which believes, as shown in *Hobby Lobby* and in *Masterpiece Cakeshop*, that the corporation reflects its ownership's interests—most especially religious ones. That summation, however, is not the end of the inquiry. A question, by result of this conclusion, arises: Does preferring the ownership's interests create a new legal condition where company ownership has a constitutional right to regulate employees based on its values? To answer this question, *Hobby Lobby* must be understood as an act of creating the corporation into a sovereign.

Ashton Peter Jones-Doherty

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Writing Sample

To Whom It May Concern:

The attached writing sample is a 14-page partial summary judgment brief written for and on behalf of Bailey & Glasser's client, West Virginia State University, in *West Virginia State University v. The Dow Chemical Company*.

While this brief was later reviewed by Bailey & Glasser Partner, Stephen Sorenson, the attached draft was only prepared by me; it has none of Mr. Sorenson's revisions.

Additionally, the citations are *Bluebook* compliant.

Warmest Regards,

Ashton P. Jones-Doherty

IN THE CIRCUIT COURT OF KANAWHA COUNTY, WEST VIRGINIA

WEST VIRGINIA STATE UNIVERSITY BOARD OF GOVERNORS for and on behalf of West Virginia State University,

Plaintiff,

v. **Civil Action No. 17-C-599**
(Judge Akers)

THE DOW CHEMICAL COMPANY, et al.,

***Defendants*.**

PLAINTIFF'S MEMORANDUM IN SUPPORT OF MOTION FOR PARTIAL SUMMARY JUDGMENT AGAINST DEFENDANT UNION CARBIDE CORPORATION ON PLAINTIFF'S PUBLIC AND PRIVATE NUISANCES AND TRESPASS CLAIMS

Pursuant to WEST VIRGINIA RULE OF CIVIL PROCEDURE 56(c), Plaintiff, West Virginia State University ("**WVSU**"), by counsel, respectfully submits this memorandum in support of its motion for partial summary judgment against Defendant, Union Carbide Corporation ("**UCC**"), on Plaintiff's claims for public nuisance (Count IV), for private nuisance (Count V), and for trespass (Count VI). Specifically, WVSU asks the Court to enter partial summary judgment against UCC on the issue of liability on Counts IV, V, and VI because it is undisputed that, first, dangerous chemicals from UCC's plant entered WVSU's groundwater and soil and, second, these chemicals interfere with WVSU's use of the property.

INTRODUCTION

For more than five years, while UCC's dangerous chemicals have continued to seep into WVSU's soil and groundwater, this case was delayed by UCC's improper removal to the federal judiciary. During this time, UCC has failed to remediate its continuous contamination of WVSU's

property. UCC *must* clean-up its toxic mess, so that WVSU's campus can be restored to its intended use. And this motion provides an expeditious avenue to do so, by dramatically narrowing discovery and ensuring this case will be ready for trial within six-months.

Any resulting trial will only evaluate appropriate damages—given this motion illustrates that UCC has admitted facts establishing its liability as a matter of law on WVSU's public nuisance, private nuisance, and trespass claims. Specifically, UCC admits two key facts. *First*, its chemicals from its facility in Institute, West Virginia (the "**Institute Facility**") contaminated WVSU's soil and groundwater. *Second*, WVSU's property is so contaminated that WVSU's groundwater and soil is toxic and thus is both unsafe to use and is required by the Environmental Protection Agency ("**EPA**") to be constantly monitored by WVSU to prevent faculty, staff, and student exposure. UCC's factual admissions means these facts "shall be deemed established," *see* W.VA. R. CIV. P. 56(d), and a jury will be instructed accordingly at trial, *see St. Clair v. Chambers*, 359 S.E.2d 622, 623 (W. Va. 1987) (formulating that W.VA. R. CIV. P. 56(d) has the "same effect" as the FED. R. CIV. P. 56(d), which requires any factual admissions "be deemed established for the trial of the case.").

UCC cannot dispute the facts it has thoroughly admitted. *See Wheeling-Pittsburgh Steel Corp. v. Rowing*, 517 S.E.2d 763, 779 (W. Va. 1999) (reasoning "the significance of such an admission is that it will stop the one who made it from subsequently asserting any claim inconsistent therewith." (cleaned up)). Consequently, allowing UCC to protract this case with superfluous discovery on issues already admitted would be an injustice to WVSU and a waste of this Court's resources. WVSU's claims of public nuisance, private nuisance, and trespass have thus been established as matter of law, making WVSU entitled to partial summary judgment on liability on those claims.

I. STATEMENT OF UNDISPUTED FACTS

WVSU, a historically Black university, is adjacent to the 433-acre Institute Facility. *See WVSU v. Dow Chemical Company, et. al.*, 23 F.4th 288, 292 (4th Cir. 2022); Ex A ("West Virginia Department of Environmental Protection RCRA Corrective Action Permit, Union Carbide Corporation Institute Operations, Permit ID #WVD005005509 (December 2018)") at UCC_WVSU_0000108564. The Institute Facility was established in 1943 by the federal government as a synthetic rubber production plant during World War II and remained under federal control until 1947 when UCC purchased the plant. *See WVSU*, 23 F.4th at 292; Ex. A at UCC_WVSU_0000108564.

From 1947 until 1986, UCC owned and operated the Institute Facility. *See WVSU*, 23 F.4th at 292; Ex. A at UCC_WVSU_0000108564. "In May 2013, the West Virginia Department of Administration transferred the former West Virginia Rehabilitation Center to WVSU, which extended WVSU's property so that it was immediately adjacent to the Institute Facility." *See WVSU*, 23 F.4th at 292 (cleaned up); *see also* Ex. A at UCC_WVSU_0000108564. "The Rehabilitation Center is in the southeastern part of the campus with the Institute facility immediately boarding it to the southwest and Kanawha River to the south." *WVSU*, 23 F.4th at 292. "Rhone-Poulenc purchased the Institute Facility in 1986 and became Aventis Crop Science in January 2000 and, subsequently, Bayer Crop Science in June 2002." Ex. A at UCC_WVSU_0000108564; *see also WVSU*, 23 F.4th at 292. UCC repurchased the Institute Facility in 2015. *See* Ex. A at UCC_WVSU_0000108564; *see also WVSU*, 23 F.4th at 292. "The Institute Facility is currently owned and operated by UCC, as a subsidiary of the Dow Chemical Company." *See WVSU*, 23 F.4th at 292; *see also* Ex. A at UCC_WVSU_0000108564.

Before repurchasing the Institute Facility in 2015, "[b]eginning in [s]pring of 2013, UCC began investigations along the western boundary of the [Institute] Facility to determine if [Institute] Facility-related [volatile] and [semi-volatile compounds] had migrated from the [Institute] Facility to beneath the adjacent WVSU property[,]" thereby impacting WVSU's groundwater. *See* Ex. A at UCC_WVSU_0000108571.

The investigation reported the worst: "[The Institute] Facility-related [compounds] likely migrated from the [Institute] Facility to beneath … [the] WVSU property[,]" and the groundwater underneath WVSU's property was thus contaminated, including under the Rehabilitation Center. *Id.*; *see also WVSU*, 23 F.4th at 294. "Notably the [investigation found] that there was an elevated risk of exposure to the contaminants at the WVSU property via 'ingestion through drinking water and inhalation through [] occupied buildings." *WVSU*, 23 F.4th at 294. Therefore, such exposure "pose[d] a carcinogenic risk." *Id.*

In response to this risk, UCC's investigators issued two recommendations to remedy the contamination. *First*, "[p]lace an environmental covenant on the WVSU property prohibiting the issue of groundwater and requiring a vapor barrier for new buildings constructed on the property." *Id.* (cleaned up). *Second*, "[p]lace an environmental covenant on the WVSU property prohibiting residential reuse." *Id.* at 295 (cleaned up). In April 2014, the EPA agreed with the investigators' findings and recommendations and issued a permit under the Corrective Action Program under the Solid Waste Disposal Act, as amended, commonly referred to as the Resources Conservation and Recovery Act ("**RCRA**"). *Id.*

The RCRA permit required additional investigations on the Institute Facility and any surrounding properties and make recommendations of how to address this contamination. *Id.* 295–96. After this investigation, in December 2018, the West Virginia Department of Environmental

Protection ("**WVDEP**") in conjunction with the EPA issued an RCRA Corrective Action Permit #WVD005005509 for UCC's Institute Facility Operations (the "**WVDEP Permit**"). *Id.*

In the WVDEP Permit, UCC affirmed to both the WVDEP and the EPA that the groundwater and soil beneath the WVSU property had been contaminated with several chemicals—such as 1,4 dioxane, 1,1 dichloroethane, chloroform, etc.—which are all regarded as carcinogens. *Id.* at 294. Thus, "groundwater contaminants from the Facility have impacted portions of neighboring properties above drinking water standards." Ex A at UCC_WVSU_0000108537.

Given the obvious danger to human health, the EPA "require[d] the following groundwater use restrictions to be implemented" on the WVSU property; these two restrictions are: *first*, the EPA required WVSU to not use the groundwater under its property except to monitor for contaminants; and *second*, the EPA required WVSU to construct no residential structures on the University's property without an EPA-approved vapor intrusion control system until "it is demonstrated to EPA that vapor intrusion of contaminants in such structure does not pose a threat to human health." Ex A at UCC_WVSU_0000108537–38, 78. The EPA made these restrictions to "protect[] … human health and he environment." Ex A at UCC_WVSU_0000108552.

As a condition of the issuance of the WVDEP Permit, UCC affirmed to the WVDEP that facts set forth in the WVDEP Permit were true and accurate, and has an obligation to address any factual inaccuracies or risk losing the Permit's protections. Ex A at UCC_WVSU_0000108528. As of this motion, UCC *has never* contested *any* factual inaccuracies in the WVDEP Permit. Indeed, UCC has affirmed WVDEP Permit's findings and requirements—especially in its January 10, 2020, Objections, Answers and Responses to Plaintiff's First Set of Interrogatories, First Set of Requests for Production, and First Requests for Admission (the "**UCC Response**").

In the UCC Response, UCC "did not dispute the [following] quoted language" incorporated and from the WVDEP Permit: these four quotes are:

- "The investigation concluded that groundwater impacts on the [WVSU] Campus likely resulted from multiple sources, **including the [Institute] Facility**." UCC Response at 37–38 (attached as Ex. B); Ex A at UCC_WVSU_0000108571 (source of quote and emphasis added).
- "[Institute] Facility-related constitutes likely migrated from the Facility to beneath …. WVSU property." UCC Response at 38 (Ex. B); Ex A at UCC_WVSU_0000108571 (source of quote).
- "Because **groundwater contaminants from the Facility have impacted portions of neighboring properties above drinking water standards**, EPA's proposed remedy requires use restrictions for activities that may result in exposure to those contaminants." UCC Response at 39 (Ex. B); Ex A at UCC_WVSU_0000108571 (source of quote and emphasis added).
- "[V]olatile organic compounds … and semivolatile organic compounds … have been detected in shallow and deep groundwater monitoring wells on the Institute facility located adjacent to the WVSU western property boundary." UCC Response at 44 (Ex. B); Ex A at UCC_WVSU_0000108567 (source of quote).

In the UCC Response, UCC also admits the following: "Defendant admits that the EPA Final Remedy requires that groundwater … of WVSU shall not be used for any purpose other than to conduct the maintenance and monitoring activities required by EPA[. And UCC] **further does not dispute the language contained within the EPA Final Remedy**." UCC Response at 40 (Ex. B) (emphasis added).

In sum, UCC admitted, first, that "…groundwater contaminants from the [Institute] Facility have impacted portions of neighboring properties above drinking water standards[,]" including WVSU's property. *See id.* at 39 (Ex. B). And second, UCC has admitted its Institute Facility's contamination interferes with WVSU's property utilization because the "EPA's proposed remedy ***requires use restrictions*** for activities that may result in exposure to those contaminants[,]" *see id.* (Ex. B) (emphasis added), and UCC's EPA remediation permit required groundwater under WVSU "***shall not be used*** for any purpose other than to conduct the maintenance and monitoring activities required by EPA[,]" *see id.* at 40 (Ex. B) (emphasis added).

These admissions combined with the foregoing facts above, in short, establish that UCC's carcinogenic chemicals from the Institute Facility contaminated WVSU's soil and groundwater, and that such chemicals, given the EPA's requirements, prevent WVSU from utilizing its property.

II. LEGAL STANDARD

Partial summary judgment is appropriate when there is "no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law." W.VA. R. CIV. P. 56(c).[1] Neither mere factual "conjectur[e]" nor "mere scintilla of evidence" amounts to genuine issue of material fact. *See Williams v. Precision Coil, Inc.*, 459 S.E.2d 329, 338 (W. Va. 1995). Rather, when there are *substantial* and *specific* facts demonstrating that a reasonable jury would need to resolve "differing version of the truth[,]" then a genuine issue of material fact exists that, indeed, is "trialworthy." *Id.*; *see also Rhodes v. E.L. du Pont de Nemours and Co.*, 657 F.Supp.2d 751, 757 (S.D.W.Va. 2009) ("[T]he nonmoving party … must offer some 'concrete evidence from which a reasonable juror could return a verdict in his [or her] favor.'" (quoting *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 256 (1986)). If a claim is not trialworthy, "[i]t is axiomatic that [partial]

[1] *St. Clair*, 359 S.E.2d at 623 (implying that all the WEST VIRGINIA RULES OF CIVIL PROCEDURE have the "same effect" as all the FEDERAL RULES OF CIVIL PROCEDURE BY comparing W.VA. R. CIV. P. 56(d) to FED. R. CIV. P. 56(d)).

summary judgment should be granted[.]" *Cf. Gaddy Eng'g Co. v. Bowles Rice McDavid Graff & Love, LLP*, 746 S.E.2d 568, 574 (W. Va. 2013) (internal quotation marks omitted).

III. ARGUMENT

This motion's request is simple, straightforward, and not rebuttable: WVSU's claims for (A) public nuisance, (B) private nuisance, and (C) trespass have been thoroughly established by UCC's two unsidpsuted factual admissions. *First*, UCC's carcinogenic chemicals from the Institute Facility contaminated WVSU's soil and groundwater. *Second*, such chemicals, given the EPA's requirements, prevent WVSU from utilizing its property. UCC has admitted both facts, thus granting this motion in full is justified.

A. WVSU Is Entitled to Summary Judgment on the Issue of Liability for its Public Nuisance Claim.

WVSU is entitled to summary judgment on the issue of liability on its public nuisance claim, because UCC's Institute Facility undisputedly released carcinogenic chemicals that contaminated WVSU's soil and groundwater so toxically that EPA expressly limited WVSU's use and enjoyment of its property.

"A public nuisance is an act or condition that unlawfully operates to hurt or inconvenience an indefinite number of persons." *Hark v. Mountain Fork Lumber Co.*, 34 S.E.2d 348, 354 (W. Va. 1945). "A public nuisance differs from a private nuisance in that the former affects the general public, while the latter only injures one person or a limited number of persons." *Courtland Company, Inc. v. Union Carbide Corporation*, No. 2:19-CV-00894, 2020 WL 5047131, at *9 (S.D.W. Va. Aug. 26, 2020) (slip copy) (citing *Hark*, 34 S.E.2d at 354). "The distinction between these two types of nuisance, however, is not simply a matter of tallying the number of people affected by a defendant's allegedly tortious conduct[,]" *see Rhodes v. E.L. du Pont de Nemours and Co.*, 636 F.2d 88, 96 (4th Cir. 2011), when "the proper characterization of a nuisance as either

private or public *depends on the nature of the interest affected by the defendant's conduct*[,]" *see id.* (emphasis added). Accordingly, "[a] public nuisance action usually seeks to have some harm which affects the public health and safety." *State ex rel. Smith v. Kermit Lumbar & Pressure Treating Co.*, 488 S.E.2d 901, 925 (W. Va. 1997).

"Ordinarily, it is the duty of the proper public officials to vindicate the rights of the public." *Union Carbide Corporation*, 2020 WL 5047131, at *9 (citing *Hark*, 34 S.E.2d at 354). Thus, a party, who is not the proper public official, must show it has suffered a "special injury" that "must be serious and permanent and affect the substance and value of their property." *Id.* (citing *Hark*, 34 S.E.2d at 354) (internal quotation marks omitted). "Special injury" includes when a defendant has "interfered with [a plaintiff's] present and future usufructuary right to use or access the groundwater" beneath their property, and when "hazardous waste emanating from [the defendant's] property is present in excessive levels within the soil on [the plaintiff's] property." *Id.* at *11.

For instance, in *Union Carbide Corp.*, the Southern District of West Virginia—while admitting that West Virginia controls "the used and benefit of [waters, including groundwater] for its citizens"—recognized that both the Supreme Courts of the United States and of West Virginia recognize property owners, like WVSU, have a usufructuary interest to access and use groundwater under their real property. *Id.* at *10 (citing *Sturgeon v. Frost*, 139 S. Ct. 1066, 1079 (2019) (describing reserved water rights as "usufructuary" in that they are rights for one to use certain waters, by withdrawing or maintaining, that one does not own); *Harvey Coal & Coke Co. v. Dillon*, 53 S.E. 928, 933 (W. Va. 1905); *Pence v. Carney*, 52 S.E. 702, 705–06 (W. Va. 1905)). Consequently, because chemicals used at UCC's railyard likely contaminated Courtland's railyard-adjacent groundwater, Courtland illustrated a special injury "because UCC has

unreasonably interfered with Courtland's present and future usufructuary right to use or access the groundwater." *Union Carbide Corporation*, 2020 WL 5047131, at *11. And because these same chemicals led to toxified soil on Courtland's property, Courtland suffered a special injury as applied to the property's soil as well. *Id.* Crucially, this holding applied regardless of whether Courtland (or West Virginia generally) was using or was expected to use the groundwater at all. *Id.* All that is required is the presence of a special injury, which Courtland showed. *Id.*

The present matter is chillingly similar to *Union Carbide Corp*. Like there, UCC's Institute Facility is adjacent to WVSU's property. *See WVSU*, 23 F.4th at 292; Ex A at UCC_WVSU_0000108564. Like there, UCC's chemicals have seeped into WVSU's soil and groundwater. *See WVSU*, 23 F.4th at 294; Ex. A, at UCC_WVSU_0000108571; *see also* UCC Response at 37–38 (Ex. B) (admitting that "[t]he investigation concluded that groundwater impacts on the [WVSU] Campus likely resulted from multiple sources, **including the [Institute] Facility**." (emphasis added)); *id.* at 38 (Ex. B) (admitting that "[Institute] Facility-related constituents likely migrated from the Facility to beneath …. WVSU property."); *id.* at 39 (Ex. B) (admitting that "[b]ecause **groundwater contaminants from the [Institute] Facility have impacted portions of neighboring properties above drinking water standards**…" (emphasis added)). And like there, WVSU has suffered an irrefutable special injury as a result of UCC's carcinogenic toxins, for "hazardous waste emanating from UCC's property is present in excessive levels within the soil on [WVSU] property." *Union Carbide Corporation*, 2020 WL 5047131, at *11; *see e.g.*, *WVSU*, 23 F.4th at 294 (Notably the [UCC investigation found] that there was an elevated risk of exposure to the contaminants at the WVSU property via 'ingestion through drinking water and inhalation through [] occupied buildings."); *id.* (such exposure "pose[d] a carcinogenic risk."); UCC Response at 44 (Ex. B) (admitting that "volatile organic compounds … and semivolatile organic

compounds … have been detected in shallow and deep groundwater monitoring wells on the Institute facility located adjacent to the WVSU western property boundary.")

UCC cannot dispute this reality, when the EPA and UCC both agreed that it is unsafe for WVSU to use the groundwater or build residential buildings in the contaminated area, and required that WVSU not to use the groundwater or build residential buildings. *See* Ex A at UCC_WVSU_0000108537–38, 78 (listing the WVDEP Permit requirements); UCC Response at 40 (Ex. B) ("Defendant admits that the EPA Final Remedy requires that groundwater … of WVSU shall not be used for any purpose other than to conduct the maintenance and monitoring activities required by EPA[. And UCC] **further does not dispute the language contained within the EPA Final Remedy**." (emphasis added)). It is also obvious that UCC's carcinogenic toxins are harmful to public health. *State ex rel. Smith*, 488 S.E.2d at 925.

UCC's contamination, as a matter of law, thus constitutes a public nuisance that has impacted the health and safety of West Virginia's public, as well as prevented WVSU from using its property without fear of poisonous interactions. Accordingly, summary judgment on the issue of liability for public nuisance should be granted.

B. WVSU Is Entitled to Summary Judgment on the Issue of Liability for its Private Nuisance Claim.

WVSU is entitled to summary judgment on the issue of liability on its private nuisance claim because it is undisputed that contaminants from UCC's facility reached the groundwater below WVSU's property. *Rhodes*, 657 F.Supp.2d at 767 ("In order to effect a private nuisance, the contaminated water must reach the groundwater below the plaintiff's property ….").

Private nuisance—"a substantial and unreasonable interference with the private use and enjoyment of another's land[,]" *see Hendricks v. Stalnaker*, 380 S.E.2d 198, 199 Syl. Pt. 1 (W. Va. 1989)—includes "[t]he release of hazardous contaminants on a plaintiff's property" for such

release "unreasonably and substantially interferes with the beneficial use and enjoyment of [his or] her land and water[,]" *see Lovejoy v. Jackson Res. Co.*, No. 2:20-CV-00537, 2021 WL 3025454, at *8 (S.D.W. Va. July 16, 2021). This rule specifically protects impermissible interference of groundwater below a plaintiff's property. *Rhodes*, 657 F.Supp.2d at 767.

Despite groundwater being publicly controlled, *see* W. VA. CODE § 22-26-3(a), both the Supreme Courts of the United States and of West Virginia recognize property owners, like WVSU, have a usufructuary interest to access and use groundwater under their real property. *See Sturgeon*, 139 S. Ct. at 1079 (describing reserved water rights as "usufructuary" in that they are rights for one to use certain waters, by withdrawing or maintaining, that one does not own); *see also Dillon*, 53 S.E. at 933; *Pence*, 52 S.E. at 705-06. Accordingly, if WVSU can prove that the contamination of its property came from UCC's property, a private nuisance caused by UCC exists. *See Union Carbide Corp.*, 2020 WL 5047131, at *1, 13 (holding "[t]he alleged contamination of soil and groundwater on plaintiff's property constitutes a substantial and unreasonable interference with plaintiff's private use and enjoyment of its property."); *Lovejoy*, 2021 WL 3025454, at *8 (holding that the release of hazardous contaminants on the plaintiff's property was "'not only an invasion'" of the "'right to the customary safe and comfortable use and enjoyment of [plaintiff's] property'" but also constitute "a condition that both presents and may present an imminent and substantial danger to human health and the environment.").

Here, it is undisputed that UCC contaminated the soil and groundwater on WVSU's property. *See WVSU*, 23 F.4th at 294; Ex. A, at UCC_WVSU_0000108571; *see also* UCC Response at 37–39 (Ex. B). Moreover, the EPA and UCC both agreed that it is unsafe for WVSU to use the groundwater or build residential buildings in the contaminated area, and required that WVSU not use the groundwater or build residential buildings. *See* Ex A at

UCC_WVSU_0000108537–38, 78 (listing the WVDEP Permit requirements); UCC Response at 40 (Ex. B).

Thus, UCC's "contamination of soil and groundwater on [WVSU's] property constitutes a substantial and unreasonable interference with [WVSU's] private use and enjoyment of its property." *Union Carbide Corp.*, 2020 WL 5047.131, at *13; *see also Lovejoy*, 2021 WL 3025454, at *8 ("…I find that the contaminates that … originate[d] from the Jackson facility unreasonably and substantially interfere with the beneficial use and enjoyment of her land water."). Accordingly, summary judgment on the issue of liability for private nuisance should be granted.

C. WVSU Is Entitled to Summary Judgment on the Issue of Liability for Its Trespass Claim.

WVSU is entitled to summary judgment on liability on its trespass claim because UCC admits that hazardous chemicals from the Institute Facility have contaminated WVSU's soil and groundwater.

Trespass—"an entry on another man's ground without lawful authority and doing some damage, however inconsiderable, to his real property[,]" *see Hark*, 34 S.E.2d at 352—includes chemical contamination of a landowner's soil and groundwater. *E.g., Weirton Area Water Bd. v. 3M Co.*, No. 5:20-CV-102, 2020 WL 7776542, at *7 (N.D.W.Va. Dec. 30, 2020) (slip copy) (denying dismissal of trespass claim because "plaintiffs have alleged evidence showing that the presence of PFAS chemicals in the Weirton water system has damaged or interfered with its possession and use of its property"). This chemical contamination must thus result in a nonconsensual "infere[nce] in the plaintiff's possession and use of that property." *Id.* (citing *Hark*, 34 S.E.2d at 352); *Metro Towers, LLC v. Duff*, No. 1:20CV206, 2022 WL 2003783, at *6 (N.D.W.Va. June 6, 2022) (slip copy) (citing same).

Here, it is undisputed that UCC contaminated the soil on and groundwater under WVSU's property. *See WVSU*, 23 F.4th at 294; Ex. A, at UCC_WVSU_0000108571; *see also* UCC Response at 37–39 (Ex. B). And this chemical contamination prevented WVSU from using its property—given the EPA and UCC both agreed that it is unsafe for WVSU to use the groundwater or build residential buildings in the contaminated area, and required that WVSU not to use the groundwater or build residential buildings. *See* Ex A at UCC_WVSU_0000108537–38, 78 (listing the WVDEP Permit requirements); UCC Response at 40 (Ex. B). This unsidpsuted evidence shows "that the presence of [UCC's] chemicals in [WVSU's ground]water … has damaged or interfered with the its possession and use of its property." *Weirton Area Water Bd.*, No. 2020 WL 7776542, at *7.

UCC's contamination, as a matter of law, thus constitutes an unlawful intrusion that prevented WVSU from using its property. Accordingly, summary judgment on the issue of liability for trespass should be granted.

CONCLUSION

UCC's contamination of WVSU's property has gone unremedied for far too long. UCC knows of its contamination, its severe risks to human health, its unrelenting impact on WVSU's property enjoyment and, indeed, UCC has thoroughly admitted these facts. Accordingly, the time has come to decide WVSU's factually applicable claims of public nuisance (Count IV), private nuisance (Count V), and trespass (Count VI), given UCC's own statements do not and cannot dispute the reality presented herein. For that reason and all the foregoing, WVSU is entitled to partial summary judgment on its claims of public nuisance, private nuisance, and trespass; this motion should be granted in full.